



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 13 2014

OFFICE OF WATER

Mr. Thomas W. Reese, Esq.
2951 61st Avenue South
St. Petersburg, Florida 33712

Dear Mr. Reese:

On June 8, 2012, you submitted a petition for rulemaking to the U.S. Environmental Protection Agency on behalf of the Florida Wildlife Federation and Alfred J. Davis and Cindy Davis ("the Davises"). The petition requests that the EPA initiate two rulemaking actions to specify: (1) how antidegradation requirements must be considered by states when making Clean Water Act section 303(d) listing decisions; and (2) the water quality-related data and information that states must assemble and evaluate when assessing against antidegradation requirements.

As discussed below, the EPA is denying the rulemaking petition because the requested regulatory changes: (1) would require a level of specificity that would not reflect the cooperative federalism approach employed by the CWA section 303(d) and the EPA's implementing regulations; (2) are not necessary because the current regulations provide an appropriate and sufficient framework to ensure that states will assemble and evaluate water quality-related data and information and assess antidegradation requirements when developing their section 303(d) list; and (3) relate to issues that would be more meaningfully addressed in guidance to states.

The CWA section 303(d), like much of the Act, employs a cooperative federalism approach: states have the primary responsibility for monitoring and identifying impaired waters and the EPA has an oversight role. *See also* the CWA section 101(b) (noting "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of [her] authority under this Act."). CWA section 303(d) requires states to identify waters for which effluent limitations are not stringent enough to implement any water quality standard applicable to such waters, and submit their lists of such waters to the EPA. The EPA reviews a state's 303(d) list to ensure that it meets the CWA requirements and then must either approve or disapprove the list within a limited timeframe.

The EPA's implementing regulations at 40 CFR 130.7 follow the same model: states are responsible for developing their 303(d) lists and providing documentation to the EPA to support their decisions to list or not list waters. While the existing listing regulations describe generally the minimum listing requirements and types of documentation the states must provide to the EPA with their 303(d) lists, the regulations do not prescribe in great detail how states must assess their waters against their various applicable water quality standards, including antidegradation. Instead, the regulations provide states with a reasonable amount of flexibility regarding how best to assess their waters against the applicable water quality standards and develop their 303(d) lists. This regulatory approach "provides the authority for a

consistent national approach for maintaining, improving and protecting water quality while allowing States to implement the most effective individual programs.” 40 CFR 130.0(a).

Overall, the petition asks the Agency to make a significant shift in its current regulatory program governing how states must make listing decisions by adding numerous prescriptive requirements to detail how states must assess against antidegradation requirements. The flexibility in the EPA’s current regulatory design is important because it reflects the underlying principles of cooperative federalism in the CWA and accounts for the fact that listing decisions are water-body specific and based on applicable water quality standards. This approach enables states to identify state-specific water quality problems and provides an effective mechanism for ensuring that goals of the CWA are achieved.

Specifically, the petition requests that the EPA address in regulation how states must assess for their state-specific antidegradation requirements. The petition requests a level of specificity that is not practical given the flexibility that is appropriately afforded to states when adopting water quality standards, including antidegradation requirements. The EPA’s regulations provide that states must adopt an antidegradation policy and identify methods that are consistent with minimum requirements, including providing certain protections for existing uses (Tier 1); high quality waters (Tier 2); and outstanding national resource waters (Tier 3). The EPA’s water quality standards regulations at Part 131 do not prescribe in specific detail how state antidegradation policies must address each of the three Tiers.¹ Antidegradation policies and procedures, therefore, may differ in some respects from state to state. For example, states have the flexibility to create additional levels of protection for their waters, such as a Tier 2 ½ classification. Tier 2 ½ waters have more stringent protection than for Tier 2 waters, but somewhat less stringent protection than the prohibition against any lowering of water quality in Tier 3 waters. If a state has different requirements for Tier 2 waters as compared to Tier 2 ½ waters, they may assess Tier 2 and Tier 2 ½ waters differently.

While the EPA’s current listing regulations explicitly make clear that states must assess for any applicable water quality standard, including antidegradation requirements, when developing their list,² the regulations do not specifically prescribe exactly how states must assess water bodies against their specific water quality standards, including designated uses, water quality criteria, or antidegradation requirements. This approach with respect to all state-specific water quality standards enables states to account for the fact that listing decisions are water-body specific and according to each state’s EPA-approved water quality standards, which are set under a regulatory scheme that allows states flexibility to take varying approaches consistent with the CWA requirements.

State listing methodologies are the appropriate place for states to address how to assess against their specific antidegradation requirements. The EPA’s existing regulation at CFR 130.7(b)(6) requires states to submit documentation supporting the state’s decision to list or not list the state’s waters. It requires states to submit to the EPA, at a minimum: 1) a description of the methodology used to develop the list; 2) a description of the data and information used to identify waters; 3) a rationale for any decision not to

¹Nor should they because an effective antidegradation program depends upon tailoring implementation to the specific needs and administrative processes of the state rather than a one size fits all approach. In addition, the CWA clearly gives states primacy in adopting water quality standards as long as such water quality standards are consistent with the CWA.

²CWA section 303(d)(1)(A) and the EPA’s implementing regulations already require states to identify waters not meeting “any water quality standards applicable to such waters. . . .” 40 CFR 130.7(b)(1). The regulations further specify that “any water quality standards applicable to such waters” refer to criteria, designated uses, and antidegradation requirements. 40 CFR 130.7(b)(3). Applicable water quality standards are those approved or promulgated by the EPA. 40 CFR 131.21.

use any existing and readily available data and information for any one of the categories of waters in 130.7(b)(5); and 4) any other reasonable information requested by the EPA. These requirements regarding submission of documentation of the state's decision-making process provide a basis for the EPA to review and approve or disapprove the state's 303(d) list.

States have the flexibility to develop an appropriate methodology for assessing the applicable state water quality standards, including numeric criteria, narrative criteria, designated uses, and antidegradation requirements. The EPA does not approve or disapprove a state's listing methodology; it reviews and considers that methodology when reviewing a state's list and has the authority to disapprove a list and add waters to a list where a state listing methodology is unreasonable in light of the state's approved water quality standards.³ The state's role in developing a methodology for how it will assess its antidegradation requirements, and the EPA's oversight role in approving or disapproving the list is consistent with the cooperative federalism approach embodied in the CWA section 303(d) and the EPA's implementing regulations. This approach thus provides states appropriate flexibility to develop state-specific methodologies to identify waterbody-specific impairments.

The petition also requests that the EPA specify in rule the data and information states must assemble when assessing against antidegradation requirements. The listing regulations at 40 CFR 130.7 are intentionally and appropriately designed to provide a basic regulatory framework for states' identification of waters not attaining applicable water quality standards. Moreover, the EPA believes that the current regulations are adequate to ensure a robust listing process, as they explicitly require a state to assemble and evaluate *all* existing and readily available water quality-related data and information needed to assess their applicable water quality standards, including antidegradation requirements, and to develop its 303(d) list.⁴ The regulations also specifically define "existing and readily available water quality-related data and information" to include, at a minimum, data and information for four specific categories of waters,⁵ and make clear that this list is not exclusive.

The regulations are not designed to identify every conceivable kind of information related to assessing each component of water quality standards - uses, criteria and antidegradation requirement - nor should they be. Assessing for each of these water quality standard components involves assembling and evaluating many different types of water quality-related data and information. It would be impractical to amend the listing regulation to specify all the kinds of water quality-related data and information for assessing each state's approved antidegradation requirements. Most importantly, the EPA already has the authority to disapprove a state's list and add a water or waters consistent with the CWA requirements if the EPA concludes that a state failed to reasonably assemble and evaluate readily available water quality-related data or information that demonstrate impairment. In fulfilling that role,

³ Where a methodology contains elements that constitute a new or revised water quality standard, the EPA would take action on those elements under CWA Section 303(c).

⁴ States also have an opportunity to assemble and evaluate additional data and information needed to establish a TMDL at the time of TMDL development.

⁵ These minimum requirements are broad enough to include water quality-related data or information relevant to assessing whether a state is meeting its antidegradation requirements in the context of 303(d) listing decisions. For example, states can use predictive models or reports including data or information from local, state or federal agencies, the public and academic institutions to assess against antidegradation requirements. Similarly, waters for which models indicate nonattainment of water quality standards may include waters not meeting the antidegradation component of water quality standards. See 40 CFR 130.7(b)(5)(ii), (iii). In addition, the public and other stakeholder groups may identify waters with water quality problems, which may inform antidegradation analyses. See 40 CFR 130.7(b)(5)(iv).

the EPA has authority to ensure sufficient information is brought to bear, and the Agency has used this authority to add waters to states' lists in appropriate circumstances.

Given the discretion inherently involved in determining information to be considered in listing decisions, it is more appropriate to address the kind of detail the Petitioners seek with respect to water quality standards assessments, including antidegradation, in guidance rather than regulation. For the reasons discussed above, the EPA's implementing regulations do not mandate specific data requirements for assessing against state-specific criteria, designated uses, or antidegradation requirements. Instead, they are designed to provide a minimum regulatory framework for the listing process. Guidance, on the other hand, allows the EPA to provide meaningful assistance to states that can address practical, specific issues and, in turn, yield more effective state 303(d) assessment and listing efforts.

In fact, since 1991 the EPA has issued guidance to assist states on a wide variety of issues relating to 303(d) listing decisions, including issues related to relevant data and information. The EPA's guidance has addressed topics similar to some of those identified in the petition, including guidance on data quantity, quality, and age; guidance on shellfish listing decisions, among others; and guidance relating to the assessment of other components of water quality standards like criteria and designated uses. For example, the Integrated Report Guidance for the 2014 303(d) listing cycle included guidance on identifying nutrient-related impairments based on narrative nutrient criteria and/or failure to support designated uses.

Since we received the petition, the EPA, in the 2014 IRG, included a section on antidegradation highlighting that states need to consider antidegradation in listing decisions. The guidance discusses Tier 3 as an example of assessing against antidegradation requirements when developing a state's 303(d) list, noting that:

"It is possible that available data and information for a water identified by a State as an Outstanding National Resource Water indicates degradation in water quality. If those data and information indicate that the water is not meeting the State's requirement for maintenance and protection of the water quality of the ONRW under the antidegradation portion of its water quality standards, in accordance with the CWA and the EPA regulations, the waters would be listed on the State's CWA section 303(d) list even if pollutant concentrations do not exceed water quality criteria levels."⁶

We acknowledge that states may benefit from additional guidance regarding methodologies for assessing against antidegradation requirements and, as noted in the 2014 IRG, we continue to examine potential approaches for states and will take into consideration the issues raised in the petition.

The EPA is exercising its discretion to deny the petition and to use other and more appropriate avenues for assisting states in considering antidegradation requirements in 303(d) listing decisions. Given differences in state antidegradation water quality standards, we anticipate that this will likely be a complex undertaking requiring time to obtain input from states and other stakeholders. Ultimately, specific and meaningful guidance on these issues will help states continue to make progress toward achieving the goals of both the petition and the CWA, i.e., to maintain and protect the nation's water quality.

⁶ EPA. 2013. Information Concerning 2014 Clean Water Sections 303(d), 305(b), and 314 integrated Reporting and Listing Decisions. Memorandum from Denise Keehner, Director, Office of Wetlands, Oceans and Watersheds. Washington, DC. http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/final_2014_memo_document.pdf

Finally, the EPA does not believe that undertaking rulemaking as requested in the petition would be the best use of its limited resources. The Agency's Office of Water, which would undertake such a rulemaking, is currently engaged in other rulemakings and other actions that, in the Agency's judgment, are more critical to achieving the goals of the CWA.⁷ Granting the petition to undertake a new rulemaking would require the Agency to cease or delay at least some of those activities, which would, overall, be detrimental to achieving the environmental objectives of the water program.

Sincerely,



Kenneth J. Kopocis
Deputy Assistant Administrator

⁷ See 79 FR 34115 (June 13, 2014); www.reginfo.gov

